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John Obodoechina Ifeka v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-614–12 OF 2018
HAS ZANAH MEHAT, DARRYL GOON AND SEE MEE CHUN JJCA
10 JANUARY 2022

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Criminal Law — Appeal — Appeal against conviction and sentence — Appellant was convicted for offence of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and sentenced to death — Whether learned trial judge erred in invoking presumption under s 37(d) of the DDA — Whether learned trial judge had imposed higher burden to appellant to rebut presumption — Whether appellant had been prejudiced – Whether learned trial judge failed to give maximum consideration of defence case — Dangerous Drugs Act 1952 ss 37(d) & 39B(1)(a)

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The appellant, a Nigerian, had arrived at the Kuala Lumpur International Airport ('KLIA') on 18 June 2014. At the baggage collection area, a police officer ('PW3') saw that the handles of the trolley bags ('exhs P25 and P26') carried by the appellant were not fully extended and the appellant was observed to be suspiciously looking to the left and to the right. Upon further examination of the trolley bags, PW3 found crystalline substances hidden inside metal rods at the bottom of the bags which were covered over by the lining material of the bags. The exhibits were then handed to the investigation officer ('PW5'). The chemist confirmed that the said crystalline substances were methamphetamine weighing 409.7g. The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The learned trial judge had invoked s 37(d) of the DDA deeming that the appellant was in possession of the dangerous drugs in question and that he had knowledge of the nature of the drugs found. The learned trial judge further found that prima facie case had been established and called the appellant to enter his defence. In defence, the appellant argued that he came to Malaysia to buy spare parts of car and that he had no knowledge of the drugs because the trolley bags belonged to one Azubike who had asked him to give the trolley bags to one Okafada upon arrival in Malaysia. At the end of the trial, the learned trial judge found that the appellant had not rebutted the presumption under s 37(d) of the DDA. The appellant was thus convicted and sentenced to death, hence, the present appeal. The appellant submitted that there was a serious misdirection by the trial judge in relying on the presumption when there was no evidence to enable a finding of knowledge on the part of the appellant and consequently, the appellant had been prejudiced in that he was imposed with a higher burden of proof, on a balance of probability, to rebut the presumption when the burden could have

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been merely to raise a reasonable doubt if the presumption was not relied upon. The appellant further argued that the learned trial judge had failed to give maximum consideration of the case for the defence when the learned trial judge had referred to the appellant having only USD200 on him when in fact he had testified that he had USD2,500 in cash, with him. It was also contended that the failure of the police to investigate into Okafada was also prejudicial to the appellant.

Held, dismissing the appeal, and affirming the conviction and sentence pronounced by the High Court against the appellant:

(1) The evidence led by the prosecution were only the basic facts of the case. There was no evidence that was exculpatory of the appellant that the prosecution could have adduced. It was thus at the close of the prosecution's case that the learned judge invoked the presumption in s 37(d) of the DDA. It was only when the defence case was called and through the testimony of the appellant that his proffered explanation of the events came to light. After considering the entirety of the evidence, the learned judge held that the appellant's testimony about Azubike were fabrications and found that the appellant had knowledge that the drugs were in the metal rods of the two trolley bags he had with him. Thus, the only conclusion was that the learned judge had rightly invoked the presumption at the close of the prosecution's case and after considering the case for the defence, his lordship then found that the appellant had the requisite knowledge about the drugs. The court therefore did not find that the appellant had been prejudiced in any way, whether as alleged or otherwise (see paras 40–42).

(2) As to whether it was USD200 or USD2,500 that the appellant had on him, the evidence that was produced in court and available to the learned trial judge was that the appellant had USD200 and not USD2,500. As for having informed the police about Okafada's telephone number, based on the appellant's own testimony, it was clear that he was not understood as he used Igbo language, and the fact remained that the police was unaware of Okafada's telephone number. There was no evidence that the appellant had sought the assistance of his counsel or an interpreter to inform the police about Okafada's telephone number. There was therefore no basis for the appellant to complain that the police had failed to investigate into Okafada. Further, PW5 had testified that he had examined the appellant's handphone and found that no one had contacted the appellant (see paras 48–51).

(3) Based on the above findings, the court did not find that there was any failure or misdirection on the part of the learned trial judge in his assessment of the defence as alleged by the appellant. In the

circumstances and for the reasons given, the court found the conviction of the appellant for the offence of trafficking under s 39B(1)(a) of the DDA was safe (see paras 53–54).

[Bahasa Malaysia summary

Perayu, seorang warganegara Nigeria, telah tiba di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') pada 18 Jun 2014. Di kawasan pengumpulan bagasi, seorang pegawai polis ('PW3') mendapati bahawa pemegang bagi dua beg beroda ('ekshs P25 dan P26') yang dibawa oleh perayu tidak ditarik sepenuhnya dan perayu kelihatan sedang melihat ke kiri dan ke kanan dalam keadaan mencurigakan. Setelah pemeriksaan lanjut ke atas beg-beg beroda tersebut, PW3 menemui bahan kristal tersembunyi di dalam batang logam di bahagian bawah beg yang ditutupi oleh bahan pelapik beg tersebut. Ekshibit-ekshibit kemudiannya diserahkan kepada pegawai penyiasat ('PW5'). Ahli kimia mengesahkan bahawa bahan kristal tersebut adalah methamphetamine seberat 409.7g. Perayu didakwa di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Hakim bicara yang bijaksana telah menggunakan s 37(d) ADB yang menganggap perayu memiliki dadah berbahaya tersebut dan dia mempunyai pengetahuan tentang jenis dadah yang ditemui. Hakim bicara yang bijaksana selanjutnya mendapati kes prima facie telah dibuktikan dan memanggil perayu untuk membela diri. Dalam pembelaan, perayu berhujah bahawa dia datang ke Malaysia untuk membeli alat ganti kereta dan bahawa dia tidak mempunyai pengetahuan tentang dadah tersebut kerana beg-beg beroda berkenaan adalah milik seorang yang bernama Azubike yang memintanya memberikan beg-beg beroda tersebut kepada seorang yang bernama Okafada sebaik tiba di Malaysia. Pada akhir perbicaraan, hakim bicara yang bijaksana mendapati perayu tidak berjaya menyangkal anggapan di bawah s 37(d) ADB. Perayu telah disabitkan bersalah dan dijatuhkan hukuman mati, oleh itu, rayuan semasa. Perayu berhujah bahawa terdapat salah arah yang serius oleh hakim bicara dalam bergantung kepada anggapan apabila tiada keterangan yang membolehkan mahkamah membuat dapatan pengetahuan di pihak perayu dan akibatnya, perayu telah diprejudiskan kerana dia telah dikenakan beban pembuktian yang lebih tinggi, atas imbangan kebarangkalian, untuk menyangkal anggapan apabila beban yang mungkin dikenakan hanyalah dengan menimbulkan keraguan munasabah jika anggapan tersebut tidak disandarkan. Perayu seterusnya berhujah bahawa hakim bicara yang bijaksana telah gagal memberikan pertimbangan maksimum ke atas kes untuk pembelaan apabila hakim bicara yang bijaksana telah menyatakan bahawa perayu hanya mempunyai USD200 di dalam pegangannya sedangkan dia telah memberi keterangan bahawa dia mempunyai wang tunai sebanyak USD2,500 bersamanya. Perayu juga berhujah bahawa kegagalan polis menyiasat Okafada juga memprejudiskan perayu.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman yang

diperintahkan oleh Mahkamah Tinggi terhadap perayu:

(1) Keterangan yang dikemukakan oleh pihak pendakwaan hanyalah fakta asas kes. Tiada keterangan yang boleh mengecualikan perayu dari kesalahan yang boleh dikemukakan oleh pihak pendakwaan. Oleh itu, pada penghujung kes pendakwaan, hakim yang bijaksana menggunakan anggapan di bawah s 37(d) ADB. Hanya apabila kes pembelaan dipanggil dan melalui keterangan perayu barulah penjelasan yang diberikannya berkenaan kejadian tersebut terbongkar. Selepas mempertimbangkan keseluruhan keterangan, hakim yang bijaksana berpendapat bahawa keterangan perayu tentang Azubike adalah rekaan dan mendapati perayu mempunyai pengetahuan bahawa dadah tersebut berada di dalam batang logam dua beg beroda yang dibawa bersamanya. Oleh itu, satu-satunya kesimpulan ialah hakim yang bijaksana telah menggunakan dengan betul anggapan tersebut pada akhir kes pendakwaan dan selepas mempertimbangkan kes untuk pembelaan, Yang Arif kemudiannya mendapati perayu mempunyai pengetahuan yang diperlukan berkenaan dadah tersebut. Oleh itu, mahkamah tidak mendapati perayu telah diprejudiskan dalam apa jua cara, sama ada seperti yang didakwa atau sebaliknya (lihat perenggan 40–42).

(2) Berkaitan dengn isu sama ada USD200 atau USD2,500 yang berada dalam pegangan perayu, keterangan yang dikemukakan di mahkamah dan tersedia kepada hakim bicara yang bijaksana ialah perayu mempunyai USD200 dan bukannya USD2,500. Berkenaan dengan makluman kepada polis mengenai nombor telefon Okafada, berdasarkan keterangan perayu sendiri, adalah jelas bahawa dia tidak difahami kerana dia menggunakan bahasa Igbo, dan hakikatnya polis tidak mengetahui tentang kewujudan nombor telefon Okafada. Tiada keterangan bahawa perayu telah meminta bantuan peguamnya atau jurubahasa untuk memaklumkan kepada polis tentang nombor telefon Okafada. Oleh itu, tiada asas untuk perayu mengadu bahawa polis telah gagal menyiasat Okafada. Selanjutnya, PW5 telah memberi keterangan bahawa beliau telah memeriksa telefon bimbit perayu dan mendapati tiada sesiapa yang menghubungi perayu (lihat perenggan 48–51).

(3) Berdasarkan dapatan-dapatan di atas, mahkamah tidak mendapati terdapat apa-apa kegagalan atau salah arah di pihak hakim bicara yang bijaksana dalam penilaiannya terhadap pembelaan seperti yang didakwa oleh perayu. Dalam keadaan tersebut dan atas alasan-alasan yang diberikan, mahkamah mendapati sabitan ke atas perayu atas kesalahan pengedaran di bawah s 39B(1)(a) ADB adalah selamat (lihat perenggan 53–54).]

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Lim Kim Wei v PP [2020] 3 MLJ 152; [2019] 10 CLJ 297, CA (refd)
Pendakwa Raya lwn Klong K'Djoanh [2016] MLJU 1644; [2016] 5 CLJ 533, CA (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
Teh Hock Leong v Pendakwa Raya [2010] 1 MLJ 741, FC (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 633, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a)

Appeal from: Criminal Trial No 45A-89–09 of 2016 (High Court, Shah Alam)

Alfred Egin (Alfred Egin & Co) for the appellant.
How May Ling (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Darryl Goon JCA:

[1] This was an appeal by the appellant, one John Obodoechina Ifeka, who was found guilty and convicted of an offence of trafficking in 409.7g of methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 and sentenced to death.

[2] The charge preferred against the appellant read as follows:

> Bahawa kamu pada 18 Jun 2014, jam lebih kurang 11.50 malam, di Pejabat Bahagian Siasatan Jenayah Narkotik, Aras 3, MTB KLIA Sepang, di dalam Daerah Sepang, di dalam Negeri Selangor, telah mengedar dadah berbahaya seberat 409.7 gram Methamphetamine. Oleh itu, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE CASE FOR THE PROSECUTION

[3] The appellant is a male Nigerian national who was, at the material time, 20 years of age.

[4] On the 18 June 2014, the appellant arrived at the Kuala Lumpur International Airport ('KLIA') in Sepang, Selangor, having flown in on board an Ethiopian Airways aircraft, Flight ET618, from Addis Ababa, Ethiopia.

A **[5]** At about 11.50pm while conducting a surveillance at the baggage collection area for International Arrival, at Level 3, MTB, KLIA, Sergeant Nor Reshiam bin Kassim ('PW3') together with his team of officers from the Jabatan Siasatan Jenayah Narkotik (JSJN) KLIA spotted the appellant, who was pulling two trolley bags, one with each arm, while also carrying a backpack, B heading towards the exit at the customs examination area.

[6] It was observed that the handles of the trolley bags that the appellant was pulling on were not fully extended, while at the same time the appellant was observed to be suspiciously looking to the left and to the right. C

[7] The appellant was then stopped by PW3 who identified himself as a police personnel by means of his authority card. The appellant was then asked to produce his passport, which he did. Based on the passport produced, the appellant was identified as John Obodoechina Ifeka. D

[8] The appellant was then instructed to have the luggage he had with him, consisting of the two trolley bags and a backpack, scanned. A body search was also conducted on the appellant. Neither the scan conducted on his luggage E nor the body search conducted disclosed any illegal or incriminating items or objects. The appellant was then instructed to bring his luggage into an office for further examination.

[9] On one of the two trolley bags identified as exh P25, was a luggage tag F with the appellant's name and the trolley bag was locked. When asked to unlock the trolley bag the appellant cooperated and produced a bunch of four keys marked as exh P24 (A–D) from the right pocket of his trousers. In the trolley bag, when opened and examined, were found several clothing items and two pairs of shoes.

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[10] Upon closer examination, it was found that the trolley bag, exh P25, had a metal rod at the bottom which was covered over by the lining material of the bag. This metal rod was identified as exh P25H. PW3 then knocked on exh P25H and found that it did not sound hollow. PW3 then removed H exh P25H from the trolley bag by removing several screws and when PW3 further knocked on exh P25H, crystalline substances came out of it. These crystalline substances were then collected into a clear plastic bag by PW3.

[11] As for the other trolley bag that the appellant was pulling, identified as I exh P26, it also had a name tag with the appellant's name on it. It was also locked. The lock was opened by the appellant using another key from the same bunch of four keys which the appellant had produced from the right pocket of his trousers. In this exh P26 was found some food items and packets of dried chillies.

[12] Upon closer examination, exh P26 revealed two metal rods, identified as exh P26F at the bottom and towards its centre. Similarly, when these metal rods were struck, they did not produce a hollow sound. Again, PW3 removed exh P26F and found crystalline substances falling out from them. These crystalline substances were also collected into a clear plastic bag.

[13] The appellant's backpack when examined, did not disclose any illegal or incriminating substance or item.

[14] The appellant was arrested by PW3 and the two trolley bags that he had with him, exhs P25 and P26, together with the items found in them were seized. PW3 then marked the exhibits and issued a search list to the appellant and lodged a police report of the arrest. The exhibits were then handed to the investigating officer, one Inspector Mohd Rashshidy bin Ab Rahman ('PW5').

[15] On 20 June 2014, PW5 sent the crystalline substances that were found within exhs P25 and P26 to, Puan Norhaya bt Jaafar ('PW2'), a government chemist, for analysis. PW2 found the crystalline substances to be 409.7g of methamphetamine.

THE HIGH COURT'S FINDING AT THE END OF THE PROSECUTION'S CASE

[16] At the end of the prosecution's case, the learned trial judge found that upon the evidence adduced, the appellant clearly had control and custody of exhs P25 and P26, in which were found the metal rods containing dangerous drugs. The learned trial judge then invoked the presumption under s 37(d) of the Dangerous Drugs Act 1952, deeming that the appellant was in possession of the dangerous drugs in question and that he had knowledge of the nature of the drugs found.

[17] The learned trial judge then stated in his grounds of judgment that based on the decision of the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and after having given maximum assessment of the evidence presented by the prosecution, as well as the credibility of the prosecution's witnesses, it was found that the prosecution had made out a prima facie case against the appellant of an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952, as charged. The defence was accordingly called.

THE CASE FOR THE DEFENCE

[18] The appellant testified in court. One other witness was also called to testify for the defence.

A **[19]** The appellant's background is as follows. He is from Lagos, Nigeria and he was 20 years of age at the time of his arrest. The appellant had no siblings. His mother passed away when he was 12 old and his father passed away when he was 19 years old. The appellant had never been overseas before his arrest. It was his first time travelling abroad when he was arrested.

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[20] After his father's demise, the appellant took over his father's business, JIC Wisdom Autolink, in Nigeria, selling spare parts for cars and in respect of which the appellant would earn some 220,000 Nigerian Naira per month, which when converted was about RM2,500.

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[21] Following his father's demise, a person by the name of Azubike Ajaebiriohun ('Azubike') would often look after the appellant. Azubike also had a similar auto spare parts shop in Nigeria. Azubike had visited Malaysia before and had advised the appellant to research and buy spare parts in
D Malaysia because they were cheaper here. Thus, the appellant came to Malaysia upon the advice of Azubike.

[22] It was Azubike who bought the appellant's flight ticket and also booked
E his accommodation. Azubike had also advised the appellant to bring with him African food, as based on Azubike's experience, African food is expensive in Malaysia and there are not many African restaurants in Malaysia. It was on Azubike's advice, that the appellant brought his favourite foods which included two packets of dried chillies.

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[23] Apart from the advice given, Azubike also asked for help from the appellant to return two bags that belonged to a friend of Azubike by the name of Okafada. The two bags were exhs P25 and P26. This was because Azubike was not going to visit Malaysia in the near future. Azubike also told the
G appellant that after returning the two bags, Okafada would give one bag to the appellant to bring back to Nigeria and therefore the appellant was advised not to bring his own bag. Azubike also gave the appellant Okafada's telephone number, which the appellant stored in his Nokia mobile phone, which was identified by the appellant and marked as exh P14.

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[24] The appellant was informed by Azubike that Okafada would contact the appellant the day following his arrival in Malaysia, ie on 19 June 2014 to collect the two bags from the appellant at the Hilton Hotel in Petaling Jaya. There was also a booking for the appellant at the Hilton Hotel, which was
I marked as exh P21 (A–B).

[25] The two trolley bags, exhs P25 and P26, were handed to the appellant the day before he left for Malaysia. The appellant looked into the two trolley bags and found them to be normal and did not have any contents in them. The

appellant subsequently put his clothes and favourite foods in them. The appellant admitted that when he pulled on the handle of the two trolley bags, they were indeed tight. However, the appellant thought that that was normal as the two trolley bags had not been used for a long time.

[26] Upon his arrival at KLIA, the appellant went to the immigration counter where he presented his money and credit card to the immigration officer and was allowed to enter the country. The appellant admitted that as he was walking towards the exit, he did turn left and right because he had never been to such a large airport. It was also his first time abroad. He was not familiar with the area in the airport and was looking out for the signs, looking for the exit.

[27] Thereafter, the appellant was instructed to produce his passport by a police officer and to place his luggage on a scanner machine to be scanned. The appellant obliged and was subsequently brought into a room for further examination. A body examination was carried out on the appellant and no illegal items were found on him. When the police were inspecting the two trolley bags, exhs P25 and P26, they found the drugs in question. The appellant explained that he was very shocked when the drugs were found in metal rods in the two trolley bags.

[28] The appellant maintained that the drugs found were not his and that he had no knowledge that there were drugs in metal rods within the two trolley bags.

HIGH COURT'S FINDINGS AT THE END OF THE CASE FOR THE DEFENCE

[29] The two trolley bags, exhs P25 and P26, had the appellant's name on their name tags. Both trolley bags were locked and their locks were unlocked by the appellant by using keys that were in his possession. As for the appellant's knowledge of the methamphetamines found, having examined the entire evidence, including having regard to the appellant's suspicious conduct, there was no doubt that his conduct was related to his knowledge of the drugs found in the metal rods of the trolley bags.

[30] The learned trial judge also found that the appellant had not successfully rebutted the presumption under s 37(d) of the Dangerous Drugs Act 1952 that was invoked. The learned judge queried why it did not cross the appellant's mind to check the handles of both the trolley bags, when he found it could not be fully extended, as it would have made it difficult for the appellant to pull the trolley bags. It was also queried why there was no attempt to repair the handles or why the appellant did not enquire from Azubike why

the handles were such. The appellant's explanation that he thought the handles were tight because the trolley bags had not been used for a long time was not accepted by the learned trial judge. The learned trial judge concluded that the appellant did not investigate further because he knew there were drugs hidden within the handles in the metal rods.

[31] The learned trial judge went on to hold that the fact that the drugs were well hidden and difficult to detect did not mean that the appellant had no knowledge that there were drugs within the two trolley bags. Reliance was place on the decision in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633 where it was stated as follows:

> [21] For the element of 'possession' (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner Appellant and Metropolitan Police Commissioner Respondent (on appeal from Reg v Warner)* [1969] 2 AC 256; *Tan Ah Tee & Anor v Public Prosecutor* [1980] 1 MLJ 49; [1978–1979] SLR 211. In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
>
> [22] We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at 438):
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> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.'

[32] The learned trial judge also observed that although it was not disputed that the appellant looked normal when he was first detained by PW3 and had cooperated fully, such cooperation does not mean he had no knowledge of the existence of the drugs. Reliance was placed on the Federal Court's decision in *Teh Hock Leong v Pendakwa Raya* [2010] 1 MLJ 741 where James Foong FCJ in delivering the judgment of the court stated:

> Of course, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. So against these circumstances, the appellant's docile conduct throughout the period described could not have inferred an absence of knowledge of the said drugs.

[33] Insofar as Azubike was concerned, the learned trial judge was of the view that his existence was a fabrication. If it was true that there was such a person by the name of Azubike, someone who had often taken care of the appellant, it was unlikely that Azubike would have made the appellant a 'scapegoat' or destroy the appellant's future by putting drugs into the metal handles of the trolley bags should the appellant be arrested.

[34] The learned trial judge also queried what spare parts could the appellant buy with only USD200, one piece of 200 Nigerian Naira, two RM10 notes and one RM1 found on him when he was arrested. The plane ticket as well as the booking for accommodation at the Hilton Hotel for fourteen nights estimated at RM6,983 (exh P21 A–B) would have been more expensive than what the appellant had in hand to buy spare parts with. In addition, there was no brochure, pamphlet or document related to vehicle spare parts found to corroborate the appellant's assertion that he was visiting Malaysia to buy spare parts. The reason given by the appellant for his visit to Malaysia was also held to be a fabrication. Based on the evidence, even if Azubike exists, the learned trial judge maintained that he would remain of the view that the appellant had knowledge that both exhs P25 and P26 contained drugs for the purposes of trafficking as per the charge preferred. For this the learned trial judge referred to the decision of the Court of Appeal in *Pendakwa Raya lwn Klong K'Djoanh* [2016] MLJU 1644; [2016] 5 CLJ 533, and the English version of the headnotes (4) where it is stated thus:

> (4) Under s 39B(1) of the DDA, what needs to be proved was possession and control as well as knowledge and not ownership. Although presumably the drugs belonged to Brave, the accused had with full knowledge brought it to Malaysia from India. That was sufficient to fulfil the requirements of s 39B(1) of the DDA. The issue as to whether Brave or Brave's brother was the owner of P24 was irrelevant for the charge under s 39B(1) of the DDA. The burden was not on the prosecution to investigate the accused's version regarding Brave who was alleged to be the true trafficker because a trafficker still needs a network such as the accused to carry out trafficking activities on his behalf.

[35] Having considered the entire evidence, the learned trial judge concluded that trafficking was proved when the appellant brought in the drugs in question from Lagos Airport to Kuala Lumpur. The requirements under s 2 of the Dangerous Drugs Act 1952 was satisfied and the appellant had failed to raise any reasonable doubt in respect of the prosecution's case. The learned trial judge also held that the appellant had failed, on a balance of probabilities, to rebut the presumption that was invoked. Accordingly, the appellant was found guilty as charged.

[36] In mitigation it was contended that the appellant was only 20 years old at the time of his arrest. His father had passed away when he was 19 years of age

and it was his first time abroad and coming to Malaysia. When he brought the drugs into the country, he was naïve and did not think carefully about the effects and consequences.

[37] However, the learned judge maintained that there was only one punishment for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 and that is death.

THE ISSUES RAISED BY THE APPELLANT IN THIS APPEAL

[38] It was contended by the appellant that at the close of the prosecution's case, the learned trial judge had invoked the presumption under s 37(d) of the Dangerous Drugs Act 1952 which states that:

> Section 37 Presumptions
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> In all proceedings under this Act or any regulation made thereunder —
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> (a) ...
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> ...
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> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in the possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

[39] However, it was contended that the learned judge then went on to make a finding from the evidence that the appellant had knowledge that the drugs in question were within the metal rods of the two trolley bags, exhs P25 and P26. It was contended that there was a serious misdirection in relying on the presumption, when there was no evidence to enable a finding of knowledge on the part of the appellant. As a result, it was maintained that the appellant had been prejudiced in that he was imposed with a higher burden of proof, on a balance of probability, to rebut the presumption when the burden could have been merely to raise a reasonable doubt if the presumption was not relied upon. In so contending, reliance was placed by the appellant on the decision in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649.

[40] We however do not find that the argument raised by the appellant was tenable in the circumstances of this case. The evidence led by the prosecution were only the basic facts of the case. There was no evidence that was exculpatory of the appellant that the prosecution could have adduced. It was thus at the close of the prosecution's case that the learned judge invoked the presumption in s 37(d) of the Dangerous Drugs Act 1952.

[41] It was only when the defence case was called and through the testimony of the appellant that his proffered explanation of the events came to light. After

considering the entirety of the evidence, the learned judge held that the appellant's testimony about Azubike were fabrications and found that the appellant had knowledge that the drugs were in the metal rods of the two trolley bags he had with him.

[42] Thus, the only conclusion was that the learned judge had rightly invoked the presumption at the close of the prosecutions case and after considering the case for the defence, his lordship then found that the appellant had the requisite knowledge about the drugs. This could only mean that not only did the appellant fail to rebut the presumption made at the close of the prosecution's case on a balance of probabilities, at the end of the trial after having heard the evidence for the defence, the learned trial judge had also found, upon considering the evidence given in the appellant's defence, that the appellant had the requisite knowledge, without having raised any reasonable doubt as to that fact. We therefore did not find that the appellant had been prejudiced in any way, whether as alleged or otherwise.

[43] The second issue raised by the appellant at the appeal was that the learned trial judge had failed to give maximum consideration of the case for the defence. In this regard reliance was made of the decision of this court in *Lim Kim Wei v Public Prosecutor* [2020] 3 MLJ 152; [2019] 10 CLJ 297 where Rhozariah Bujang JCA (as Her Ladyship then was) stated thus:

> [8] On the facts of the present case, we find there is merit in the contention of learned counsel for the appellant. In accordance with the provisions of s 182A(1) of the Criminal Procedure Code, it is the duty-bound of learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt. The legislature has advisedly used the term 'all the evidence'. The emphasis must be on the word 'all'. In the context of the present case, the cautioned statement tendered by the appellant is one of the evidence which learned JC should take into consideration in order to make a finding whether or not the prosecution has proved its case beyond reasonable doubt. The aim of this provision is obviously to make certain that an accused person gets a fair trial.

[44] It was here contended that the appellant's explanation that he had come to Malaysia to survey and to buy spare parts was consistent. In this regard, based on the cross examination of PW5, PW5 had agreed that he was told by the appellant that he had come to Malaysia to look for spare parts.

[45] It was contended that the learned trial judge in coming to his conclusion that the appellant's explanation was a fabrication was based on an error of fact. The learned trial judge had referred to the appellant having only USD200 on him when in fact in his evidence, the appellant himself had testified that he had USD2,500 in cash, with him. Although it was conceded

that the police denied having found USD2,500 on the appellant, it was contended that the learned trial judge was clearly wrong on the facts.

[46] It was further contended that in finding that the appellant did not enquire from Azubike why the handles of the two trolley bags could not be fully extended because the appellant knew there were drugs in them, the learned trail judge had failed to properly consider the appellant's case. It was because Azubike had looked after the appellant and had also bought him his flight tickets and made the hotel reservations, that the appellant trusted Azubike. That the handles of the two trolley bags did not work properly was admitted by the appellant.

[47] It was also contended that the failure of the police to investigate into Okafada was also prejudicial to the appellant. It was contended that the appellant had testified that he had informed the police about Okafada and about Okafada's telephone number in the appellant's mobile phone.

[48] As to whether it was USD200 or USD2,500 that the appellant had on him, the appellant's testimony during his examination in chief was as follows:

> PB: Just now you mentioned that you had USD2500 and 2 credit cards with you, did you see the money and the 2 credit cards in Court today?
>
> SD1: No, I did not see the USD 2500 and 2 credit cards. What I saw is only USD 200.
>
> PB: Do you know what happened to the money and the 2 credit cards?
>
> SD1: I don't know what happened to the money and the credit cards.

Thus, the evidence that was actually produced in court and available to the learned trial judge was that the appellant had USD200 and not USD2,500.

[49] As for having informed the police about Okafada's telephone number, the following was the appellant's testimony given in his examination-in-chief:

> PB: Is there anything else you told the officer?
>
> SD1: I told the police that Azubike's phone number and Okfada's phone number are in my phone.
>
> PB: What language did you use to speak to the officer?
>
> SD1: I told them in Igbo language but it looks they don't understand Igbo language.

[50] Igbo language is the principal native language of the Igbo people, an ethnic group from eastern Nigeria. When testifying in the trial, the appellant had the services of an interpreter who translated from English to Igbo and vice versa.

[51] Based on the appellant's own testimony, it is clear that he was not understood and the fact remained that the police was unaware of Okafada's telephone number. There was no evidence that the appellant had sought the assistance of his counsel or an interpreter to inform the police about Okafada's telephone number. There was therefore no basis for the appellant to complain that the police had failed to investigate into Okafada. In this context, it may be pointed out that PW5 had testified that he had examined the appellant's handphone and found that no one had contacted the appellant.

[52] My learned sisters Has Zanah Mehat and See Mee Chun JJCA have each had the opportunity to read this judgment in draft and they have both expressed their concurrence with it.

[53] In light of the foregoing, we do not find that there was any failure or misdirection on the part of the learned trial judge in his assessment of the defence as alleged by the appellant.

CONCLUSION

[54] In the circumstances and for the reasons given, we found the conviction of the appellant, John Obodoechina Ifeka, for the offence of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 to be safe and the appeal was unanimously dismissed. The conviction and sentence pronounced by the High Court against the appellant was affirmed.

Appeal dismissed; conviction and sentence pronounced by High Court against appellant affirmed.

Reported by Dzulqarnain Ab Fatar